IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.8627 OF 2004

Meghraj Bhikamchand Jain
Age 71 years, Occ: Business
r/at CTS No.375, Shukrawar
Peth, Near Jayjaywant
Apartments, Pune-411 006. .... Petitioner

- Versus -

1. Smt. Radhabai Krishnaji
Gandhi, age 77 years,
Occ: Household, r/at 21/10
Premnagar Colony,
Pune-Satara Road,
Pune-37.

2. Murlidhar Krishnaji Gandhi
Age 59 years, Occ: Service
r/at Bhaskar Co-op. Society,
Pune-Satara Road, Pune-9.

3. Shankar Krishnaji Gandhi
Age 55 years, Occ: Service
r/at 21/10, Premnagar Colony
Pune-411 037.

4. Anil Krishnaji Gandhi
Age 53 years, Occ: Service
r/at B-15, Keshav Housing

Complex, Dhankawadi,
Pune-411 043.

5. Nandkumar Krishnaji Gandhi
Age 48 years, Occ: Service
r/at Near Padmavati Temple
Pune-411 009. .... Respondents

Shri V.G. Mujumdar for the Petitioner.
Shri S.N. Chandrachud for the Respondents.

CORAM: R.M.S. KHANDEPARKAR, J.
DATED: OCTOBER 25, 2004

ORAL JUDGMENT:

1. Heard. Rule. By consent, the rule is made returnable forthwith.

2. The petitioner challenges the judgment and order passed by the lower Appellate Court on 4-8-2004 in Civil Appeal No.758 of 2003 on various grounds. However, it is not necessary to deal with all those grounds, and suffice to refer to only one ground which relates to the contention relating to the illegality on the part of the lower Appellate Court in relying upon the documents which were, admittedly, refused to be admitted in evidence by the trial Court. Obviously, the lower

Appellate Court has dismissed the appeal relying upon the documents inspite of the fact that those documents were not allowed to be exhibited and, therefore, they were not forming part of the evidence in the matter.

3. The trial Court had refused the leave to exhibit the documents, namely, the power of attorney and the development agreement by its order dated 27-7-2004 and yet the lower Appellate Court while dismissing the appeal has held thus:-

> "12. The respondents/plaintiffs have produced the copies of power of Attorney executed in favour of Mohan Sopanrao Gaikwad and Development Agreement, executed by the developer of property alongwith list Exhibit 23/1 and 19/2 respectively. They are verified by Nazir from the original. It shows that the respondents/plaintiffs have entered into agreement with developer to develop the property and developer has paid huge consideration of Rs.3,30,000/- to the respondents/plaintiffs. Therefore, the apprehension in the mind of appellant/defendant that the respondents/plaintiffs will not provide

them accommodation in new building, is not sustainable. There is provision in the Act to punish the landlord in case the safeguard of tenants are protected by providing accommodation.

13. It is argued on behalf of the appellants/defendants that though the respondent/plaintiff has paid deficit stamp duty on documents - power of Attorney and Development Agreement, the said documents are not registered as required U/s. 17 of the Indian Registration Act, those documents are not exhibited and therefore, they cannot be read in evidence.

14. ......

15. The respondents/plaintiffs have filed undertaking of power of Attorney in all suits as required by the provision of Sec. 13(1)(h)(h) of the (old) Bombay Rent Act."

4. Obviously the dismissal of the appeal is clearly influenced by the documents which were not exhibited in

the evidence by the trial Court and against which there was no appeal, nor the illegality or propriety of the order passed by the trial Court was in question before the lower Appellate Court in the said appeal. Once the documents were not forming part of the evidence on account of refusal on the part of the trial Court to allow the respondents to exhibit those documents in evidence, the lower Appellate Court could not have even referred to those documents and certainly, therefore, could not have taken into consideration the said documents for the purpose of decision in the appeal. The documents which were not in the evidence having been relied upon for the dismissal of the appeal, the lower Appellate Court has clearly acted illegally while dismissing the appeal and on that count alone the impugned judgment and order cannot be sustained and is liable to be set aside. On setting aside the impugned judgment and order, it would be necessary to remand the matter to the lower Appellate Court in order to enable it to decide the appeal afresh after hearing both the parties, in accordance with the provisions of law and without relying upon the said two documents.

5. In the result, therefore, the petition succeeds. The impugned judgment and order is hereby quashed and set aside for the reasons stated above and the matter is remanded to the lower Appellate Court to decide the same

afresh in accordance with the provisions of law after hearing the parties and ignoring the said two documents. The rule is made absolute accordingly with no order as to costs.

6. Certified copy expedited.